

mands to the control of those things which are essential to make the power existing and operative,—a conclusion, the truth of which cannot be escaped in the light of the doctrine on that subject, so luminously stated in *Gibbons v. Ogden*, 9 Wheat. 1, and which has been the guide by which the Constitution has been successfully interpreted and applied from that day to this.

While these considerations demonstrate that the attempted distinction is but a denial of the existence of a power which it is conceded it would be frivolous to deny, we briefly refer to the legislative history from the beginning for the purpose of showing that the authority which it is now insisted was not included in the right to prohibit importation has at all times been considered to be and treated as within the scope of such authority. Thus in 1799 the Customs Act of that year (March 2, 1799, § 69, chap. 22, 1 Stat. 627, 678) contained a provision for a seizure and forfeiture of merchandise imported in violation of its terms and imposed penalties upon any person who should "conceal or buy any goods, wares or merchandise, knowing them to be liable to seizure by this act." And by the act of March 3, 1823 (chap. 58, 3 Stat. 781), amending the act of March 2, 1821 (chap. 14, 3 Stat. 616) a like authority was asserted and penalties and forfeitures were imposed for violations. Again in 1866 in an act to prevent smuggling (§ 4, act of July 18, chap. 201, 14 Stat. 178, 179) the identical provisions found in the section here in question were made applicable generally to all importations and were sanctioned by making violations thereof criminal. And these provisions passed into the Revised Statutes (§ 3082), and are in force today, the particular provision here involved concerning opium being part of the act of 1909 prohibiting the importation of that article. In the face of this unbroken legislative interpretation of the extent of the power to prohibit covering a period of more than one hundred and

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fifteen years, of the constant exertion of administrative authority under such legislation and of the assumption that such power undoubtedly obtained, manifested by a multitude of judicial decisions too numerous to refer to although many of them are cited in the argument of the Government, we can discover no possible ground upon which the contention to the contrary here relied upon can rest, and therefore the conclusion that it is wholly unsubstantial and frivolous cannot possibly be escaped.

In the argument it is however suggested that some support for the view relied upon results from the ruling in *Keller v. United States*, 213 U. S. 138, wherein a provision of the act known as the White Slave Act (Feb. 20, 1907, chap. 1134, 34 Stat. 898) was held to be beyond the power of Congress to enact. In fact the provisions of that statute are printed in a parallel column with the statute here assailed and the conclusion is drawn that the identity between them is perfect and therefore, despite the considerations involved in the review which we have made, it has come to pass not only that the assertion of the want of power in Congress here relied upon is not frivolous, but that it is well founded and must be upheld if the *Keller Case* is not to be overruled. But the contention is itself frivolous since it is based upon a mere failure to observe the broad line which separates the ruling in the *Keller Case* from the question here involved. Nothing can make this plainer than the mere statement that while in the *Keller Case* it is true there was a prohibition against the importation for immoral purposes of the persons whom the statute enumerated, the act punished not the harboring of persons for immoral purposes who had been brought into the United States in violation of the prohibition against importation, but its provisions also embraced the harboring of persons for immoral purposes if they were aliens even although they had come into the United States lawfully. The basis upon which the *Keller Case* proceeded

was so manifest that Congress amended the act by making the penal clause which was held unconstitutional, applicable only to those immoral aliens who had come into the United States in violation of the prohibitions of the act (March 26, 1910, § 2, c. 128, 36 Stat. 263, 264).

In the argument reference is made to decisions of this court dealing with the subject of the power of Congress to regulate interstate commerce, but the very postulate upon which the authority of Congress to absolutely prohibit foreign importations as expounded by the decisions of this court rests is the broad distinction which exists between the two powers and therefore the cases cited and many more which might be cited announcing the principles which they uphold have obviously no relation to the question in hand. In fact it is true to say of the citation of these cases as well as of the reference to the *Keller Case* that a proposition which is so wholly devoid of merit as to be frivolous is not given a substantial character by an attempt to support it by contentions which are themselves wholly devoid of all merit and frivolous.

There being no possible ground upon which to attribute even semblance of foundation for the constitutional question relied upon, it follows that it affords no basis for our jurisdiction to directly review and the writ of error is

*Dismissed for want of jurisdiction.*